Filed 2/24/09 In re Tarver CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re KEVIN TARVER, on Habeas Corpus.	B201532 (Los Angeles County Super. Ct. No. BH003634)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter Espinoza, Judge. Affirmed.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Heather Bushman and Amanda Lloyd, Deputy Attorneys General, for Respondent and Appellant

Roger S. Hanson for Petitioner and Appellee.

The People, respondent and appellant, appeal from a superior court order granting a petition for writ of habeas corpus filed by petitioner and appellee, Kevin Tarver. The superior court, having determined the evidence did not support the Governor's decision to deny Tarver parole, reinstated the decision of the Board of Parole Hearings (hereafter, the Board) which had found Tarver was suitable for release on parole. The People now contend the superior court erred by reversing the Governor's decision.

The judgment is affirmed.

PROCEDURAL BACKGROUND

Tarver has been imprisoned since 1977 following his conviction for first degree murder and six counts of armed robbery. He was 16 years' old when he committed the murder. After a parole suitability hearing on August 2, 2005, a panel of the Board found Tarver suitable for release. On December 7, 2005, the Governor reversed the Board's decision. Tarver appealed that decision by filing a petition for writ of habeas corpus in superior court. On August 7, 2007, the superior court granted Tarver's habeas petition. The superior court issued an order which vacated the Governor's decision, reinstated the Board's decision, and ordered Tarver's release on parole "in accordance with the parole date that the Board calculated."

The People appealed the superior court's order. We granted the People's accompanying petition for writ of supersedeas and stayed the superior court's order pending finality of this appeal.

THE COMMITMENT OFFENSE

Following a jury trial, Tarver was convicted of first degree murder and six counts of robbery, all with firearm use enhancements. For the murder conviction, he was sentenced to prison for an indeterminate term of life with the possibility of parole.

The following description of the murder is generally taken from the Governor's decision finding Tarver unsuitable for parole. On February 8, 1977, Tarver and two companions, David Jones and Rodney Knox, entered a record store in Long Beach. Tarver was armed with a nine-millimeter handgun, which he pointed at the two store employees while Jones took money from the cash register. Just then, Herbert Banks, the

owner of the record store, drove up in his car, parked and walked in. When he realized what was going on, Banks turned around and ran back to his car. Tarver and his companions chased after Banks. Tarver fired twice, hitting Banks in the face with his second shot. Tarver and his companions fled.

The police found Banks lying in the street next to his car. Nearby were two spent shell casings from Tarver's gun. Also nearby was a Webly revolver which belonged to Banks. Tests showed that the Webly had not been fired. Banks was pronounced dead on arrival at the hospital.

At the 2005 parole suitability hearing, Tarver testified that Banks "startled us, and one thing led to another, and we followed him [out] of the store – he ran out of the store, and we . . . ran after him, and I fired a shot in the direction of his car." Tarver said he fired because Banks "was obstructing the way to our get-away car . . . he was crouched down beside his car, and I was assuming that he had a weapon, and was stopping us from getting to this get-away car to fled [*sic*] the scene. And I fired another shot, and that shot unfortunately hit Mr. Banks and killed him."

Asked why he felt he had to shoot Banks, Tarver testified: "[T]here was a lot of things going on that night outside of the [record store]. I conclude that what I thought I heard as a shot was more than likely a car backfiring, and I thought that the victim was firing at me, also obstructing me from getting to the get-away car. So I felt that if I fired a shot in his direction, toward his car, that he would either get in his car and stop shooting toward us, or just leave, but that didn't happen sir, unfortunately. So I fired a shot."

The following colloquy then occurred:

"DEPUTY DISTRICT ATTORNEY SEQUEIRA: So is the inmate saying that he was not intending to shoot anyone, but he was just shooting in the direction of the car?

"PRESIDING COMMISSIONER INGLEE: Was your intention to scare somebody and not kill anybody?

"INMATE TARVER: Yes sir, that was exactly my intentions."

THE BOARD'S FINDINGS

The hearing panel concluded Tarver was suitable for parole because his release would not pose an unreasonable threat to public safety. The panel based its decision on what it considered to be the following positive factors: Tarver had no juvenile record; he had a stable social history; he had participated in prison educational, therapy and vocational programs; he had realistic parole plans; and, he "ha[d] maintained positive institutional behavior, which indicates a significant improvement in self-control over the last ten years. He has shown signs of remorse."

The panel quoted from a 2004 psychological report which had concluded that " 'through maturity, individual and group therapy and psychotherapy, this individual was able to get in touch with his underlying factors that contributed to his anti-social behavior and (indiscernible) used psychologically to rationalize and minimize his behavior. Today this individual has accepted responsibility for his action. He is able to understand and accept the consequences for his behavior and is . . . quite capable of standing up to people or ideas he believes are not in society's best interest. . . . There are no barriers to parole at this time from a mental health point of view.' "

The panel also cited a 2003 psychological report,[1] which, in part, specifically addressed "the Governor's concerns that the inmate is distancing himself from feelings of guilt or remorse through his interpretation of the crime, as well as not accepting responsibility for the crime." This report concluded Tarver " 'does not present any tendencies to diminish his responsibility for the crime he committed. He has fully accepted the responsibilities for his past actions. He expresses appropriate remorse for the victim. It appears that the inmate developed anti-social behavior and mainly committed crimes for monetary gains as well as being defiant towards authority accompanied by narcissistic traits and the needs for instant gratification. Not only do these traits appear to be nonexistent, but he has matured into a responsible adult, and has

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[1] The 2003 psychological evaluation had been conducted by a different mental health professional than the one who conducted the 2004 evaluation.

put these things in the past. He now uses normal coping mechanisms to deal with stress, and in conclusion, Mr. Tarver would not present any significant risk for violence if released. . . . He does not show any evidence of distancing himself from the crime, and shows appropriate remorse for his actions as well as empathy for the victim. This inmate should do well if granted parole.' "

GOVERNOR'S DECISION

The Governor reversed the hearing panel's suitability finding on the ground Tarver still constituted a threat to public safety. Other than the facts of the commitment offense, the Governor's decision primarily addressed the evolution of Tarver's description of how that crime came about:

"As discussed in my decision last year, Mr. Tarver's version of the robbery and murder has changed substantially over the years. From 1977 to 1986, he denied committing the murder and tried to blame one of his partners. In 1986, he admitted murdering Mr. Banks, but tried to justify his actions by claiming that Mr. Banks fired his own gun before Mr. Tarver shot his. In 1988, during a psychological evaluation, Mr. Tarver stated that he shot towards Mr. Banks only after hearing gunshots as Mr. Banks ran from the store and then seeing Mr. Banks shooting a gun from behind a car door. During a 2003 psychological exam, Mr. Tarver stated that he had assumed that Mr. Banks had a gun when he saw him crouched behind a car door. Mr. Tarver now states that what he heard that day were not gunshots. At his 2003 parole hearing, Mr. Tarver admitted that he never saw the victim holding a gun, but claimed that he saw a gun lying in the street by Mr. Banks after he shot him. He also stated at the 2005 parole hearing that Mr. Banks was 'stopping us from getting to this getaway car.'

"I continue to be troubled by Mr. Tarver's reluctance to take full responsibility for his crime. As I stated in my decision last year, he has changed his story several times over the years. And even now, Mr. Tarver continues to minimize his actions by stating that he shot at Mr. Banks because he assumed the victim had a gun and was blocking the path to the getaway car. He does not address the fact that he admitted at the 2005 hearing that he and his crime partners 'ran after' Mr. Banks when he ran out of the store.

While I do believe that Mr. Tarver now accepts some culpability for his actions, I still have doubts as to whether he accepts full responsibility for his crime."

The Governor then noted other concerns: "Mr. Tarver was 17 years old when he entered prison nearly 29 years ago. He was a very young man and led a wild and reckless life. His criminal history includes joyriding and a string of armed robberies – those that he admitted to committing before the murder and those that he committed after the murder and for which he was convicted. He also admits to stealing about ten cars and trafficking in stolen auto parts before he started committing robberies. During Mr. Tarver's incarceration, he has received numerous disciplinary reports, the last of which he received in 1995. While Mr. Tarver has a history of disciplinary problems while incarcerated, I do recognize that he has remained disciplinary-free for 10 years."

The Governor noted Tarver had "used his time in prison adequately. He obtained his GED in 1989 and completed vocational training in auto mechanics, welding, and dry cleaning." The Governor noted Tarver "has held several work assignments while incarcerated and received several laudatories for his work. During 2005, he received several commendations for dealing with his addiction in a positive way, his motivational speaking, and his positive work as a tutor. In 2003, his Inmate Day Labor supervisor stated that Mr. Tarver has been an asset based upon his dependability and willingness to help others. In 2001, a correctional officer commended Mr. Tarver for his positive attitude and his assistance in settling potential disruptive situations among inmates. Mr. Tarver appears to have been a good worker in most of his positions. Although he was removed from the dental clinic in 1998 for poor behavior, Mr. Tarver received a commendation from his supervisor in 2005, recognizing him for performing well and respectfully during the two years she worked with him. Mr. Tarver has established and maintained solid relationships, and continues to receive support from family and friends. Additionally, he has reasonable parole plans that include a job offer and a place to live at Amity Foundation residential treatment facility upon his release."

The Governor said: "Despite the positive strides Mr. Tarver has made during his incarceration, I cannot overlook the heinous crime he committed, the gravity of which alone is sufficient for me to conclude that his release from prison would continue to pose an unreasonable risk to public safety. Mr. Tarver and his accomplices entered the record store with the intent of robbing the clerk. Mr. Tarver carried a 9mm semi-automatic pistol into the store for this specific purpose. . . . [H]e pointed the gun at the two clerks . . . and continued to hold them at gunpoint while his accomplices emptied the cash register. Then, when Mr. Banks entered the store, observed the robbery in progress, and ran outside, Mr. Tarver and his accomplices followed. At this point the robbery had been committed and Mr. Tarver and his crime partners could have simply fled. Instead, Mr. Tarver fired two shots . . . before fleeing . . . . One of those shots struck Mr. Banks in the face, killing him. The facts of this senseless and brutal crime go well beyond the minimum necessary for a first-degree murder conviction. Moreover, I note that after killing Mr. Banks, Mr. Tarver and his accomplices went on to commit four additional armed robberies, further jeopardizing the safety of at least four other innocent victims."

SUPERIOR COURT'S FINDINGS

The superior court granted Tarver's habeas corpus petition after concluding "the Governor's decision denying petitioner's parole is not supported by 'some evidence.' " Although the superior court agreed with the Governor that the commitment offense had been "especially heinous, atrocious and cruel," the court concluded "there is no evidence indicating petitioner's release would unreasonably endanger public safety at this time."

In reaching this conclusion, the superior court noted the Board's decision to grant parole in 2005 "was the third consecutive time that the Board granted parole for petitioner." "The commitment offense occurred thirty years ago when petitioner was just sixteen years old. Since that time he has engaged in institutional activities that indicate [an] enhanced ability to function within the law upon release." The court noted Tarver's participation in prison educational and vocational programs, his good work evaluations, his recent discipline-free 10-year stretch, his realistic parole plans, and the 2004 psychological report concluding that he had accepted responsibility for his actions.

The court reasoned: "All of these recent positive gains tend to show that the prisoner is currently suitable for parole. In contrast, the only factors tending to indicate unsuitability are the immutable circumstances of the commitment offense and the accompanying additional armed robberies, all of which occurred three decades ago. Due to the long lapse in time since the offense, its predictive value has diminished. The offense is, therefore, no longer some evidence that petitioner continues to pose [an] unreasonable risk of danger to society."

CONTENTION

The superior court erred by reversing the Governor's parole decision.

DISCUSSION

1. *Legal principles governing parole decisions.*

Penal Code section 3041, subdivision (a),[2] provides: "One year prior to the inmate's minimum eligible parole release date a panel [of the Board of Parole Hearings] shall . . . meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . . The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates."

As we recently explained in *In re Aguilar* (2008) 168 Cal.App.4th 1479: "Release on parole is thus 'the rule, rather than the exception.' [Citation.] A parole release date must be set unless the Board determines that public safety requires a lengthier period of incarceration. [Citations.] Every inmate has a constitutionally protected liberty interest in parole decisions ordered by the Board and reviewed by the Governor. [Citation.]

"In determining suitability for parole, the Board must consider certain factors specified by regulation. Circumstances tending to establish unsuitability for parole are that the inmate (1) committed the offense in an especially heinous, atrocious, or cruel

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[2] All further statutory references are to the Penal Code unless otherwise specified.

manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. [Citations.]

"Circumstances tending to show suitability for parole include that the inmate (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life, especially if the stress had built over a long period of time; (5) committed the crime as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that suggest an enhanced ability to function within the law upon release. [Citations.]

"The foregoing factors are general guidelines, and the Board must consider all relevant information. [Citations.] The fundamental consideration is public safety. [Citation.] [¶] The Governor's power to review a decision of the Board is set forth in article V, section 8, subdivision (b) of the California Constitution. 'Article V, section 8(b), requires that a parole decision by the Governor pursuant to that provision be based upon the same factors the Board is required to consider.' [Citation.]" (*Id*. at pp. 1486-1487, fns. omitted.)

"[T]he Governor undertakes an independent, de novo review of the inmate's suitability for parole. [Citation.] Accordingly, the Governor has discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258.)

2. *Standard of review.*

"We must affirm a Governor's decision that an inmate is unsuitable for parole if 'some evidence' supports the conclusion that the inmate is *currently* dangerous. [Citation.] 'Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor. . . . [T]he precise manner in

which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious.' [Citation.]" (*In re Aguilar, supra,* 168 Cal.App.4th at p. 1488, fn. omitted.)

"[J]udicial review to ensure that gubernatorial parole decisions are supported by some evidence neither overrides the merits of the decisions nor controls the exercise of executive discretion. As the United States Supreme Court explained in a related context: 'Requiring a modicum of evidence to support a decision [to deny parole] will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens. In a variety of contexts, the [United States Supreme] Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. [Citations.]' [Citation.] 'Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is *any* evidence in the record that could support the conclusion reached by [the Governor]. [Citations.]' [Citation.]" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 664-665.)

Our Supreme Court recently affirmed that "because the core statutory determination entrusted to the Board and the Governor is whether the inmate poses a current threat to public safety, the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191.) However, *Lawrence* also set forth the following clarification: "[W]ith regard to the aggravated circumstances of a commitment offense, we conclude that to the extent our decisions . . . have been read to imply that a particularly egregious commitment offense *always* will provide the requisite modicum of evidence supporting the Board's or the Governor's decision, this assumption is inconsistent with the statutory mandate that the Board and the Governor consider all relevant statutory factors when evaluating an

inmate's suitability for parole, and inconsistent with the inmate's due process liberty interest in parole that we recognized in *Rosenkrantz*." (*Ibid*.)

"It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public. [¶] Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings. [Citations.]" (*In re Lawrence, supra,* 44 Cal.4th at p. 1212.) "[T]he relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Id*. at p. 1221.)

"[U]nder the some evidence standard, a reviewing court reviews the *merits* of the Board's or the Governor's decision, and is not bound to affirm a parole decision merely because the Board or the Governor has adhered to all procedural safeguards. . . . This standard is unquestionably deferential, but certainly is not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision – the determination of current dangerousness." (*In re Lawrence, supra,* 44 Cal.4th at p. 1210.)

3. *Application of law to this case*.

We conclude the superior court did not err by finding that the Governor's decision to deny Tarver parole was unsupported by some evidence in the record.

The Governor's fundamental reason for denying parole was the nature of the commitment offense. The Governor said, "I cannot overlook the heinous crime he committed, the gravity of which alone is sufficient for me to conclude that his release from prison would continue to pose an unreasonable risk to public safety."

The concluding paragraph of the Governor's decision stated: "While Mr. Tarver has made creditable gains during his incarceration, in revisiting this murder, I find that the gravity of this heinous first-degree murder presently outweighs any positive factors supporting Mr. Tarver's parole. I believe he would continue to pose an unreasonable risk of danger to society if he is released at this time."

Although the superior court agreed the circumstances of the commitment offense had been aggravated,[3] the court pointed out the crime happened 30 years' ago when Tarver was only 16. (See *In re Barker* (2007) 151 Cal.App.4th 346, 376 [Board erred by failing to consider inmate had been only 16 at time of commitment offense because " ' "the general unreliability of predicting violence is exacerbated in [a] case by . . . petitioner's young age at the time of the offense [and] the passage [of significant time since]" ' "].) The superior court properly cautioned that " 'the predictive value of the commitment offense may be very questionable after a long period of time,' " and that " '[r]eliance on an immutable factor, without . . . consideration of subsequent circumstances, may be unfair, run contrary to the rehabilitative goals espoused by the prison system, and result in a due process violation.' " (See *In re Lawrence*, *supra*, 44 Cal.4th at p. 1211 ["the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness"].)

As noted, *ante*, the Governor's " 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and . . . the determination of current dangerousness."

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[3] The superior court found: "Although only the store owner was killed during [an] armed robbery, petitioner and his crime partners also pointed guns at the clerks behind the cash registers. One was ordered to lie down on the floor. Petitioner went on to rob other stores at gunpoint, thereby attacking several victims. Additionally, the crime was especially atrocious in that the motivation to obtain money is very trivial in relation to the offense of murder. [Citation.] Therefore, there is some evidence to support the Governor's conclusion that the crime was especially heinous, atrocious and cruel."

(*In re Lawrence, supra,* 44 Cal.4th at p. 1210.) Here, it is apparent the Governor concluded the most important nexus between the murder and Tarver's unsuitability for parole was what the Governor characterized as Tarver's "reluctance to take full responsibility for his crime." (See *In re Shaputis, supra,* 44 Cal.4th at p. 1260, fn. 18 [inmate's failure to gain insight into commitment offense constituted some evidence that inmate remained dangerous].) But we cannot find any evidence in the record to support this purported nexus.

Without explanation, the Governor ignored the Board's finding that Tarver had accepted responsibility. The Board relied on a 2003 psychological report concluding Tarver "does not present any tendencies to diminish his responsibility for the crime," and a 2004 psychological report concluding Tarver "has [today] accepted the responsibility for his past actions." The Governor, on the other hand, noted that "[i]n 1991, a psychologist conducting an examination . . . found that given the numerous therapy programs that [Tarver] had participated in, 'it was disconcerting that defensiveness, denial, superficiality and potential impulsivity remain of concern.' It appears that significant gains regarding Mr. Tarver's insight into his crime were not made until 1997 – 20 years after he entered prison." But the recent nature of Tarver's insight should not weigh against his suitability for parole. (Cf. *In re Barker, supra,* 151 Cal.App.4th at p. 368 ["[n]one of the suitability factors require that a prisoner's gains be maintained 'over an extended period of time' "].)

Nor do we find any evidence to support the Governor's finding that "even now, Mr. Tarver continues to minimize his actions . . . ." The Governor reasons Tarver is still evading responsibility "by stating that he shot at Mr. Banks because he *assumed* the victim had a gun and was blocking the path to the getaway car. He does not address the fact that he admitted at the 2005 hearing that he and his crime partners 'ran after' Mr. Banks when he ran out of the store." (Italics added.) But the record shows Banks did have a gun, and that Tarver believed Banks was going to hinder access to the getaway car. There is nothing in the record to contradict Tarver's testimony that he shot at Banks to scare him away so Tarver and his companions could escape. Tarver's running after

Banks was consistent with his belief that Banks, who had apparently parked his car right next to the getaway car, might prevent the escape.

The other factors mentioned by the Governor have no discernible nexus to the question of Tarver's present danger to public safety if released on parole. For example, the Governor noted Tarver had "engaged in several therapeutic programs from 1984 to 1990, but ceased participation in any therapy programs from 1991 to 2000. . . . While I acknowledge that Mr. Tarver has actively participated in Alcoholics Anonymous from 2000 to 2003 and Narcotics Anonymous from 1997 to 2005, his complete lack of participation in programs for approximately ten years continues to cause me to question whether he has thoroughly addressed his problems and will be able to lead a productive, crime-free life if he is paroled." We fail to see the point of this finding in light of the much more recent professional findings that there was nothing problematic about Tarver's mental health.

Because there is no evidence in the record supporting the Governor's determination that Tarver should not be paroled because he remains a danger to public safety, we find the superior court did not err by reversing the Governor's decision. And contrary to the Attorney General's assertion that the only proper remedy in this situation is a remand to the Governor, we believe a remand to the Governor would amount to an idle act. (See *In re Aguilar, supra,* 168 Cal.App.4th at 1491 ["Because we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the Board, a remand to the Governor would amount to an idle act."].)

We conclude, therefore, that the superior court's reversal[4] of the Governor's parole decision should be affirmed.

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[4] We note that two clerical errors in the superior court's original order granting habeas corpus relief were subsequently corrected by separate order.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.